

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 7, 2007 Session

IRIS KAY SNODGRASS v. ROBERT H. SNODGRASS

**Direct Appeal from the General Sessions Court for Loudon County
No. 9446 Hon. William H. Russell, Judge**

No. E2007-00576-COA-R3-CV - FILED MARCH 31, 2008

In this divorce case the issues tried by the Trial Judge are essentially raised on appeal. The Trial Judge held that the parties' respective 401(k) accounts after subtracting the premarital portion were marital property, that the monthly pension benefits at the time of the divorce were held to be defined benefit pensions and divided between the parties, and the Trial Court refused to consider an expert witness proffered by the husband.

On appeal we affirm the Trial Judge in part, reverse in part and remand.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the General Sessions Court Affirmed in Part, Reversed in Part and Remanded.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Robert H. Green and Catherine E. Shuck, Knoxville, Tennessee, for appellant.

Craig L. Garrett, Maryville, Tennessee, for appellee.

OPINION

In this divorce action the parties had been married for 24 years at the time of the divorce, and the husband was 66 years old and the wife was 57 years old at that time. There were no children born to the marriage.

The Trial Court entered a Decree of Divorce pursuant to a mediated settlement and Tenn. Code Ann. §36-4-129. The Order approved and set out the terms of the mediated settlement regarding the division of marital property and the issues remaining to be decided by the Court. The Court then heard evidence on the remaining issues. The parties stipulated that an equitable division of the marital portions of both parties' savings plans and pensions at issue would be an equal division, but the parties disagreed on the amount of the marital portions.

Following trial, The Trial Court entered an order holding that the premarital balances in the parties' respective 401(k) accounts were separate property. The balances of the parties' 401(k) accounts (after subtracting the separate, premarital portion) were considered marital property by the Court and were to be combined and divided equally between the parties.

The Court found that the husband's monthly pension benefit was \$4,200.75 at the time of the divorce and his monthly vested accrued pension benefit as of the date of the marriage was \$1,446.57. The Court subtracted \$1,446.57 from the monthly benefit of \$4,200.75 to determine the monthly benefit accrued during the marriage as \$2,754.18. The Court ordered that the parties would share the monthly benefit of \$2,754.18 equally. The Court also ordered the husband to continue to pay the premium for a surviving spouse benefit under the terms of the pension plan, which provided that, should the husband pre-decease the wife, the wife would receive one half of the husband's pension at his death for the remainder of her life.

The Court stated that the wife's monthly pension benefit was \$1,405.76 until she reached the age of sixty-two, when the monthly pension benefit would drop to \$751.35. The wife's monthly vested accrued pension benefit at the time of the marriage was \$284.54. The Court subtracted \$284.54 from \$1,405.76 to determine the wife's monthly pension benefit accruing during the marriage as \$1,121.22 and ordered that the parties would split the \$1,121.22 monthly benefit equally. Based on this division of the parties' monthly pension benefits accrued during the marriage, the husband was ordered to pay the wife \$816.48 a month, beginning with March 2006 until the wife's sixty-second birthday when the husband's monthly obligation to Wife would increase to \$1,107.72 to account for the decrease in the wife's own pension benefits. Each party was to pay their own attorneys' fees, no discretionary costs were awarded and the parties were to share the costs equally.

Issues raised on appeal are summarized as follows:

- A. Whether the Trial Court erred in holding that the growth during the marriage of the premarital portion of the parties' 401(k) accounts was a marital "retirement benefit" rather than the parties' separate property?
- B. Did the Trial Court abuse its discretion when it divided the marital portions of the parties' defined-benefit pensions by assigning one half of the parties' combined monthly benefits to each party without taking into consideration the life expectancies of the parties?

- C. Did the Trial Court abuse its discretion when it excluded the husband's proffered expert witness, a certified public accountant, when the expert witness was offered to assist the Court in determining the separate property portion of the parties' 401(k) accounts and the division of the defined-benefit pensions?

The standard of review in a non-jury case is *de novo* upon the record of the proceedings below and the Trial Court's factual findings are presumed to be correct, absent evidence preponderating to the contrary. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993), but there is no presumption of correctness with respect to the Trial Court's conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); Tenn. R. App. P. 13(d).

In a divorce proceeding questions regarding the classification of property as either marital or separate, as opposed to questions involving the appropriateness of the division of the marital estate, are inherently factual. *Cutsinger v. Cutsinger*, 917 S.W. 2d 238, 241 (Tenn. Ct. App. 1995); *Current v. Current*, No. M2004-02678-COA-R3-CV, 2006 WL 656791 at *1 (Tenn. Ct. App. Mar. 15, 2006); *Bilyeu v. Bilyeu*, No. M2003-00294-COA-R3-CV, 2005 WL 3190338 at *3 (Tenn. Ct. App. Nov. 28, 2005).

The trial court's decision as to the classification of property is given great weight on appeal. *Cooke v. Cooke*, No. M2001-03026-COA-R3-CV, 2003 WL 21392003 at *5 (Tenn. Ct. App. June 17, 2003). Also, trial courts are afforded wide discretion in dividing the marital property *Ford v. Ford*, 952 S.W.2d 824, 825 (Tenn. Ct. App.1996). The trial court's distribution will be given great weight on appeal and we are not inclined to disturb a trial court's division of marital property unless it is determined that the distribution lacked proper evidentiary support or resulted from either an error of law or a misapplication of the statutory requirements. *Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. Ct. App.1990).

The parties do not dispute that the balances in the parties' 401(k) accounts at the time of the marriage were separate property and not subject to division by the court.¹ The husband, however, disputes the Trial Court's holding that the remainder of the funds in the parties' 401(k) accounts were marital property and subject to division by the Court, and that it was error for the Court to classify the accounts as "retirement benefits" under Tenn. Code Ann. § 36-4-121(b)(1)(B)(2007). The wife counters that the Trial Court's finding that the accounts were "retirement benefits" were properly found to be retirement benefits, and were appropriately classified by the Court as marital property.

Tenn. Code Ann. §36-4-121(b)(1) defines marital property. The Trial Court held that

¹ The premarital balance in the husband's 401(k) account was \$53,645.00 and the wife's premarital balance was \$17,124.00.

the Alcoa 401(k) accounts were “retirement benefits” and thus the contributions during the marriage and the growth of the accounts during the marriage were marital property pursuant to section §36-4-121(b)(1)(B.) (Marital property includes . . . the value of . . . retirement . . . rights relating to employment that accrued during the period of the marriage).

The issue thus becomes whether or not the 401(k) accounts in question are “retirement benefits” under the statute.

The husband relies on the Supreme Court’s decision in *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 742 (Tenn.2002) to support his position. The issue addressed by the Supreme Court in *Langschmidt* was whether the increase in value of the husband’s separate, premarital Individual Retirement Accounts (“IRAs”) during the marriage was automatically marital property under Tenn. Code Ann. § 36-4-121(b)(1)(B) because the IRAs were a “retirement benefit”. The husband argued that his IRAs were not marital property because they were not a “vested pension, retirement or other fringe benefit right.” Rather, he argued, the IRAs, which were funded solely with premarital earnings, should be treated like savings accounts that existed before the marriage, thus separate property. The wife countered that, by definition, the IRAs are retirement benefits, and as such, the increase in value of the husband's IRAs during the marriage represented accrued retirement benefits and were marital property under the code section. *Langschmidt* at 748 - 749.

The Supreme Court agreed with the husband and held that the husband's premarital IRAs were not retirement benefits under Tenn. Code Ann. § 36-4-121(b)(1)(B). The Court relied on *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996) to support this conclusion. The Court said:

In *Cohen*, this Court held that unvested pension benefits accrued during the marriage are marital property, even though the statute only expressly designated accrued “vested” pension benefits to be marital property. In so holding, we noted that [t]o the extent earned during the marriage, the benefits represent compensation for marital effort and are substitutes for current earnings which would have increased the marital standard of living or would have been converted into other assets divisible at dissolution.... **[R]etirement benefits have been described as part of the consideration earned by an employee, and as a form of deferred compensation provided by the employer for work already performed.**

Langschmidt at 749 (citing *Cohen*, 937 S.W.2d at 828-29) (citations omitted, emphasis added).²

²Tenn. Code Ann. § 36-4-121(b)(2)(A) was amended after the Supreme Court issued the *Langschmidt* opinion by 2002 Pub. Acts, c. 651 § 8 to define separate property as “all real and personal property owned by a spouse before marriage, including . . . assets held in . . . IRAs”.

Like the IRA's in *Langschmidt*, the portions of the 401(k) accounts at issue here do not represent deferred compensation during the marriage as they were funded with premarital earnings. Thus, as in *Langschmidt*, the premarital portions of the 401(k) accounts were not "retirement benefits" as defined by *Cohen* and should have been classified as separate property.

However, the wife argues that unlike the IRAs at issue in *Langschmidt*, the Alcoa 401(k) accounts are "retirement benefits" under the statute because they are related to the parties' employment with Alcoa as they were "provided by the employer, managed by the employer and includes matching funds paid by the employer." This argument fails to consider the definition of "retirement benefits" provided by the Supreme Court in *Cohen* and *Langschmidt* (retirement benefits are part of the consideration earned by an employee in the form of deferred compensation provided by the employer for work already performed). The monies used to fund the 401(k) accounts were not deferred income, but rather compensation provided by the employer at the time earned.

This Court recently considered the issue presented here in *White v. White*, No. E2006-00595-COA-R3-CV, 2007 WL 63602 (Tenn. Ct. App. Jan. 10, 2007) under facts similar to the evidence before us. In *White* the 401(k) retirement plan at issue was provided to the husband by his employer. At the time of the marriage the 401(k) had a balance of \$99,647 and that amount was classified as the separate property of the husband at the time of divorce. During the marriage, the balance of the 401(k) account had grown by \$399,148 due to post-marital contributions in the amount of \$144,000 and post-marital market appreciation in the amount of \$255,148. The trial court determined that \$102,059 of the total post-marital appreciation of \$255,148 constituted appreciation of the premarital funds of \$99,647, and classified the \$99,647 that was in the account at the time of marriage and the appreciation of that amount for a total separate property distribution to the husband from the Plan of \$201,706. The trial court based its classification of the growth as separate property due to the fact that all appreciation to the Plan was market-driven and that the wife made no contribution to the preservation and appreciation of the account. The remaining balance in the account, which was attributable to the marital contributions of \$144,000 and appreciation associated with that amount totaling \$153,088, was classified as marital property and distributed as marital property. *White*, 2007 WL 63602 at *2.

The wife appealed, and this Court framed the issue presented as "whether that portion of the . . . [p]lan that belonged to Husband at the time of the parties' marriage is a retirement benefit under T.C.A. § 36-4-121(b)(1)(B), and based its decision on *Langschmidt*, holding that the 401(k) plan was not a retirement benefit. *White*, 2007 WL 63602 at *3. The Court found that, as with the *Langschmidt* IRAs, "the \$99,647 that was in the . . . [401(k)] at the time of the marriage, and conceded by the parties to be Husband's separate property, did not represent deferred marital compensation provided by Husband's employer during the marriage." The Court held that the trial court properly classified any post-marital appreciation on the \$99,647 as the husband's separate property since there was no proof of the wife's substantial contribution to its preservation and appreciation. *White*, 2007 WL 63602 at *4. Following the holdings in *White* and *Langschmidt*,

the Trial Court's classification of the earnings on the Snodgrasses' premarital portion of their 401(k) accounts as "retirement benefits" and thus marital property was error.

The wife further argues, however, that in the event the appreciation of the premarital balance of the 401(k) accounts are not found to be "retirement benefits" and classified as marital property, the appreciation is still marital property under the statute because the spouses "substantially contributed to [the] preservation and appreciation" of the accounts. She claims that she and the husband substantially contributed to the growth of the premarital and post-marital portions of the 401(k) accounts because they discussed investment strategy together and moved their money around within the plan to maximize their investment return.

The increase in value constitutes marital property only when *both spouses* have substantially contributed to its preservation and appreciation. Tenn. Code Ann. § 36-4-121(b)(1)(B); *Harrison*, 912 S.W.2d 124, 127. The spousal contributions may be either "direct" or "indirect," Tenn. Code Ann. § 36-4-121(b)(1)(D), and must satisfy the following two requirements. One, the spousal contributions must be real and significant, *McFarland v. McFarland*, No. M2005-01260-COA-R3-CV, 2007 WL 2254576 at *6 (Tenn. Ct. App. Aug. 6, 2007). Two, a link must be shown between the spouses' contributions and the appreciation in the value of the separate property. *McFarland* at *6 "[where] the appreciation is due solely to market factors and not to efforts of either spouse, the increase in value will not be considered marital property." *McFarland* at *7.³

The Supreme Court recently addressed the second requirement and stated that the question should be "whether the real and significant contributions directly or indirectly *caused* the preservation and appreciation in value of the separate property." *Keyt v. Keyt*, — S.W. 3d —, 2007 WL 4409712 at *6 (Tenn. Dec. 19, 2007). In *Keyt* the Court considered whether the appreciation in the value of the husband's stock, which was separate property, was marital property. The stock at issue was from a family owned, closely held corporation started by the husband's father and was given to the husband by his parents. The husband worked for the family business during the course of the marriage, however he testified he had no managerial authority and he was not a officer, director or head of a division. The husband took the position that his contributions to the family owned company were not substantially related to the appreciation in the value of the company's stock and that his contributions were no different than that of any other employee of the company.

The Court, in its analysis, observed that whether the increase in value of the property will be classified as marital property, the focus is on whether the non-owner of the property made marital contributions to the property sufficient to satisfy the "substantial contribution" threshold. The *Keyt* Court reasoned that if it was found the husband had not "substantially contributed" to the

³ See *Morgan v. Morgan*, No. M2002-00793-COA-R3-CV, 2003 WL 22037325 at *3 (Tenn. Ct. App. Aug. 29, 2003); *Cooke v. Cooke*, No. M2001-03026-COA-R3-CV, 2003 WL 21392003 at *4 (Tenn. Ct. App. June 17, 2003); *Raulston v. Raulston*, No. E2005-02463-COA-R3-CV, 2006 WL 2737996 at *3 (Tenn. Ct. App. Sept. 26, 2006)(appreciation which is purely market-driven does not constitute a substantial contribution by a spouse).

appreciation of the stock it could be classified as separate property without the court's consideration of the wife's contributions. *Id.* at *5, and concluded that the evidence did not establish the husband had substantially contributed to an increase in value and the stock was deemed to be separate property.

Here the evidence does not support the wife's contention that the parties substantially contributed to the appreciation of the premarital portions of the investment accounts. Accordingly, the evidence does not support a finding that the appreciation of the premarital portions of the accounts should be considered marital property under Tenn. Code. Ann. § 36-4-121-(b)(1)(B).

In addition to the provisions of the cited code section, Tennessee courts have recognized that separate property may become marital property by virtue of the closely related doctrines of transmutation and commingling. The Supreme Court, in *Langschmidt*, addressed these doctrines as follows:

[S]eparate property becomes marital property [by commingling] if inextricably mingled with marital property or with the separate property of the other spouse. If the separate property continues to be segregated or can be traced into its product, commingling does not occur.... [Transmutation] occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property.... The rationale underlying these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate. This presumption is based also upon the provision in many marital property statutes that property acquired during the marriage is presumed to be marital. The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

Langschmidt at 747.

The wife argues that the marital and premarital portions of the parties' 401(k) accounts have been commingled to the extent that the premarital portion and its growth have become marital property. The husband counters that because the growth of the premarital portion of the 401(k) accounts can be "traced into its product" through detail tracing as explained by his expert witness, these funds are not inextricably commingled and the premarital portion and its growth have not become marital property.

Assets acquired during the marriage are assumed to be marital property. Tenn. Code. Ann. § 36-4-121(b)(1)(A); *McFarland*, 2007 WL 2254576 at *4. The husband, as the party asserting that the appreciation of the pre-marital portion of the 401(k) accounts acquired during the marriage is not marital property, has the burden of establishing by a preponderance of the evidence that the assets in question can be segregated from contributions made with marital funds and gains.

Under the holdings of *Miller v. Miller*, No. W2003-00851-COA-R3-CV, 2004 WL 1334516 (Tenn. Ct. App. June 14, 2004) and *Smith v. Smith*, 93 S.W.3d 871 (Tenn. Ct. App. 2002).

Transmutation takes place when the parties treat separate property, in this case the pre-marital portion of the 401(k)s and its appreciation, in such a way as to reflect an intention that it become marital property. *Langschmidt*, 81 S.W.3d at 747. Transmutation may occur, for example, when the separate property of one spouse is used to purchase other property, which is then placed in the name of both spouses. *Barnhill v. Barnhill*, 826 S.W.2d 443 at 452 (Tenn. Ct. App.1991). Placing the title to a piece of property in the names of two parties creates a rebuttable presumption of a gift to the marital estate. *Smith*, 93 S.W.3d at 878; *Wright-Miller v. Miller*, 984 S.W.2d 936, 941 (Tenn. Ct. App.1998). Here, \$180,000 of Husband's 401(k) was used to partially fund the purchase the marital home. There was no dispute at trial that the home was marital property, and the husband admitted there was no way to determine if the \$180,000 came from the premarital funds and its appreciation or from the postmarital contributions and their appreciation. The husband did not show at trial or through the proffered testimony of his expert that the \$180,000 withdrawn from his account was solely from the marital portion of the 401(k) account, and he did not rebut the presumption that transmutation occurred. See *Hunter v. Hunter*, No. M2002-02560-COA-R3-CV, 2005 WL 1469465, *6 (Tenn. Court App. Jun. 21, 2005). We hold that the husband's 401(k) account became marital property and subject to equitable division under the rationale of commingling and transmutation.⁴

As for the funds in the wife's 401(k) account, the Trial Court erred in finding that only the balance in her account at the time of the marriage, \$17,124, was separate property. We remand this issue to the Trial Court to determine what portion of the wife's 401(k) account is attributable to the appreciation of the premarital portion of her account. On that determination, that amount should be designated as the wife's separate property and awarded to the wife.

The husband relies on The Supreme Court's decision in *Cohen* to support his argument that the Trial Court erred in its equal division between the parties monthly benefits from the two pensions. He contends that the Trial Court should have determined the net present value of the pensions using the methodology presented by the Supreme Court in *Cohen* before dividing the benefit between the parties. He contends that the proffered testimony of his expert accountant, which included a calculation of the net present value of the two pensions, should have been accepted by the Trial Court. He further contends that the Court should have taken into consideration the eleven year difference in life expectancy between the husband and the wife and should have reached a more equal split of the pension benefits between the parties. The husband contends that to effectuate the equal division of the marital portions of the pensions, the Trial Court should have split

⁴We invoke the familiar rule that if a trial court reaches the correct result for the wrong reason, we can affirm the result. See *Arnold v. City of Chattanooga*, 19 S.W.3d 279 (Ct. of App. 1999).

evenly the lifetime value of both pensions and not the amount of the monthly benefits. To this end, he proffered the testimony of his expert accountant who calculated the net present value of the pensions, which he claims is the preferred method of calculating the value of a pension under *Cohen*.

The husband's reliance on *Cohen* is misplaced. The issue the Supreme Court considered in *Cohen* was whether an interest in an unvested retirement plan is marital property as defined by Tenn. Code Ann. § 36-4-121(b)(1). *Cohen* at 825. The Court held that unvested retirement benefits accrued during the marriage are marital property and are subject to division under the cited code section. *Cohen* at 828, 830. The issue of the valuation of a vested and mature pension, like the Snodgrass pensions, was not before the *Cohen* court and thus was not considered by it.

The *Cohen* Court reviewed the concept of vested and unvested retirement benefits as follows: "An employee has a "vested" retirement right when the employee has completed the requisite term of employment necessary to be entitled to receive retirement benefits at some future time. A "vested" right matures when an employee reaches retirement age and elects to retire. Frequently, vested, but immature rights, are conditioned upon the employee reaching retirement age. An "unvested" retirement account is one in which the time period requirements have not been fulfilled." *Cohen*, 937 S.W.2d at 826. Here it is undisputed that the Snodgrass pensions were both vested and mature as both parties had actually retired and were collecting monthly pension benefits.

In this case the Trial Judge held the *Cohen* methods of evaluation were not applicable here because:

"[w]e know what the benefits are." Indeed, the trial judge was correct, each party had been receiving a fixed certain retirement benefit for several years before the divorce. Thus the value of retirement benefits could easily be determined as near as possible to the date of the divorce as required by Tenn. Code Ann. § 36-4-121(b)(1)(A) and *Cohen*. The Trial Court did not abuse its discretion in valuing the pensions based on the monthly benefits that Husband had received since 1994 and Wife since 1998.

Finally, the husband contends that the Trial Court should have allowed his expert accountant to testify regarding the segregation of the growth of the premarital portion of the 401(k) accounts from the marital portion of the accounts and the net present value of the marital portion of defined-benefits pensions. As we have noted, due to the commingling of the funds in the husband's 401(k) account, the premarital balance and its growth became marital property, thus testimony on the segregation of those funds from the post-marital contributions and their appreciation was not needed and would not have been helpful to the Trial Judge. On the other hand, the appreciation of the wife's premarital balance remained separate property and the expert witnesses testimony on the segregation of the earnings on her premarital property would have been helpful to the Trial Court. The valuation of the net present value of the vested and mature pension benefits was not appropriate, thus the expert's testimony was unnecessary and not helpful to the Court.

We hold the Trial Court did not abuse its discretion when it did not allow the husband's expert accountant to testify regarding his 401(k) or the defined benefit pension plans. However, the Trial Court did err in not considering the expert's testimony regarding the wife's 401(k) plan and whether the growth of the premarital balance in the account could be segregated from the rest of the funds in the plan.

In sum, we hold the Trial Court erred when it held that the growth of the premarital portion of the 401(k) accounts were "retirement benefits" under Tenn. Code Ann. § 36-4-121(b)(1)(B). The appreciation of the premarital balance of the wife's 401(k) account should be classified as separate property if it can be segregated from the marital contributions and their gains on remand. The Trial Court should have classified the husband's entire 401(k) account as marital property subject to the division by the Court under the related doctrines of commingling and transmutation.

The Trial Court did not abuse its discretion when it divided equally between the parties the marital portion of the monthly benefits from the Alcoa pensions.

The Trial Court did not abuse its discretion when it did not allow the expert testimony of the husband's expert accountant, as it would not have offered assistance to the Court.

The cause is remanded for further proceedings consistent with this Opinion and the entry of a modified Judgment as to the division of the marital estate. The cost of the appeal is assessed one-half to Iris Kay Snodgrass and one-half to Robert H. Snodgrass.

HERSCHEL PICKENS FRANKS, P.J.